United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1330

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEC ND CIRCUIT

DOCKET NO. 76-1330

B P/S

UNITED STATES OF AMERICA,

Appellee,

v.

GLENN WALTER ALEXANDER DeLaMOTTE,

Defendant-Appellant.

PETITION FOR REHEARING

Jacob D. Zeldes
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UNITED STATES OF AMERICA

COURT OF APPEALS

FOR THE

SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
v.	:	NO. 76-1330
	:	
GLENN WALTER ALEXANDER DE LA MOTTE,	:	
	:	
Defendant-Appellant	:	

PETITION FOR REHEARING

Defendant is reluctant to seek further consideration from this Court, but the Court's single reference to Davis v. United States, 417 U.S. 333, 346 (1974) indicates to defendant that further consideration is not inappropriate--particularly in view of the thirty year sentence that defendant is serving on a conviction based on the testimony of a single alleged co-defendant, United States v. De La Motte, 434 F.2d 289, 291 (2 Cir. 1970).

Defendant does not urge blanket reargument as to all issues, but urges the Court to reconsider his position on his petition pursuant to 28 U.S.C. §2255 insofar as he based his claim on the original trial court's error in instructing the jury and in the grand jury acting improperly solely upon hearsay.

In large measure the Davis case upon which the Court relies establishes that defendant's §2255 motion can be grounded on either constitutional or statutory claims. What the cited page reference seems to imply is that defendant must show he was "prejudiced by the

asserted" error. To help meet that burden, defendant files this Petition for Rehearing and makes these points:

I. Defendant's claim of error with regard to the jury charge concerns a cautionary instruction given by the trial court while the key prosecution witness, and alleged co-defendant Charles Jackson, was on direct examination. The Government had elicited from Mr. Jackson his "deal" with the Government in return for his testimony in the De La Motte trial which included a promise that he, Jackson, would be allowed to be at liberty on bond during the period that his appeal to this Court of his own conviction and 25 years sentence was pending. (4/2/69 Tr. 70, 71). At that point in the trial the Court spontaneously and erroneously informed the jury that,

> "...once the appeal is taken, it is the exclusive jurisdiction, with respect to the matter of bond appeal, of the Appellate Court. In this case, the United States Court of Appeals for the Second Circuit." (4/2/69 Tr. 72)

and that

> "This Court no longer has jurisdiction." (4/2/69 Tr. 72).

Contrary to the substance of the instruction given to the jury, just one week after the termination of the De La Motte trial the trial Court ordered the release of Mr. Jackson on a non-surety bond pending the outcome of his appeal (Supplement to Record on Appeal, Document No. 2 Ex. C.) Clearly, the District Court had continuing jurisdiction to consider and grant release on bond pending appeal even though Mr. Jackson had already filed his notice of appeal to this

Court. Rule 9, Federal Rules of Appellate Procedure.

The showing of "prejudice" to defendant's right to a fair trial, required for success or collateral review by the Davis case, supra, is the devestating impact that the trial Court's erroneous instruction probably had on the defendant's efforts to discredit the only witness against him. The jurors might very well have concluded from the erroneous instruction that the question of bond was now only an "appeal" issue solely in the jurisdiction of an appellate court. They could well have concluded that, despite the Government promise, Mr. Jackson had been denied bond by the District Court and would have to convince the Court of Appeals that such denial was error in order to secure his liberty. In the minds, then, of a jury hearing a close case on the evidence,[1] the strong motive of the key Government witness to give false testimony was very largely diminished.

In Kibbe v. Henderson, 534 F.2d 493 (2 Cir. 1976) this Court recently recognized that an erroneous jury instruction which affects a criminal defendant's right to a fair trial can be the valid subject of collateral review. Kibbe was a review of a New York state court murder conviction. This Court expressly found that there was sufficient evidence to uphold Kibbe's murder conviction. 534 F.2d at 499, yet a new trial was ordered soley on the basis of the

1. Even though defendant did not testify in his own behalf, and offered no evidence at all, the jury deliberated for some period of time on the afternoon of April 15, 1969 and from 10 a.m. until 3:25 p.m. on April 16, 1969 before convicting defendant. (Record on Appeal, N, O).

erroneous jury instruction on the issue of causation of the victim's death. A fortiori, in this case seeking review of a federal conviction in a case where the evidence of defendant's participation in the crime is not at all conclusive, it is submitted that collateral relief is appropriate.

The right to effective cross-examination of a prosecution witness, particularly on credibility, has been held to be paramount even to a state's interest in protecting the records of its juvenile offenders, Davis v. Alaska, 415 U.S. 308, 319 (1974). Evidence showing bias arising out of a government offer of leniency or immunity demonstrates a special motive to lie, and is peculiarly probative, for, if believed, it

> "...colors every bit of testimony given by the witness whose motives are bared." United States v. Blackwood, 456 F.2d 526 (2 Cir. 1972).

In this case the erroneous instruction of the trial court deprived defendant of this credibility-impeaching device to such a significant extent to deny him a fair trial.

II. This Court likewise affirmed the District Court in dismissing defendant's claim that he was illegally indicted solely on the basis of hearsay evidence in violation of the doctrine of this Court's rule in United States v. Umans, 368 F.2d 725 (2 Cir. 1966) and United States v. Esteppa, 471 F.2d 1132 (2 Cir. 1972). By its page reference to Davis v. United States, supra, the Court appears to have affirmed the denial of this claim on the basis of lack of prejudice.

Under the peculiar facts of this case defendant submits that a showing of prejudice has been made and consequently seeks reargument of this point.

The record concerning the indictment of defendant De La Motte and his two co-defendants are set forth in detail in the Brief and Appendix of Defendant-Appellant De La Motte, dated September 16, 1976 at pp. 5-8 and pp. 58-59. Briefly summarized, the situation is one where there was no stenographic transcript of the grand jury proceedings. The "yellow sheet" grand jury minutes have been misplaced and are not available. It is quite clear from the background and circumstances of the case that the indictment of defendant De La Motte was based on the hearsay presentation of oral statements made to federal authorities by co-defendant Charles Jackson and possibly also the hearsay presentation of statements made by co-defendant John Walsh. It is a matter of record that both Jackson (4/3/69 Tr. 77-143) and Walsh (6/14/72 Tr. 97) had refused to sign written statements presented to them by the FBI prior to the grand jury proceedings. Jackson thereafter stood trial (and was convicted) in his own case. Walsh thereafter plead guilty to one count but did not cooperate or testify at any of the trials. It is abundantly clear that neither Jackson nor Walsh was cooperating with the Government at the time of the proceedings before the grand jury which indicted them as well as defendant De La Motte.

The situation, then is one where the Government had no prima facie case against defendant De La Motte. It had no way of securing a conviction against him. It nonetheless presented a case based solely on hearsay to a grand jury in the bare hope that someone would be indicted and thereafter could be induced by promise of reward to cooperate against defendan.. As such, the indictment of defendant was illegally obtained by fraudent purpose by the Government with no basis for any expection of conviction. It is established that for purposes of federal injunctive intervention into state criminal proceedings, a prosecution cannot be allowed to proceed if it is shown to be initiated in bad faith with no expectation of obtaining a conviction. Dombrowski v. Pfister, 380 U.S. 479, 490 (1965); Cameron v. Johnson, 390 U.S. 611 (1968); Allee v. Medrano, 416 U.S. 802 (1974). Defendant De La Motte's indictment, it is submitted, falls within the ambit of that proscription in that the Government used hearsay evidence to obtain an indictment against him without any expectation that it would be able to convict him at trial.[2] It is against the background of this severe prejudice

2. This argument has been specifically advanced in a separate and subsequent petition filed by defendant De La Motte in the District Court under 28 U.S.C. 2255 during the period that this appeal was pending. Glenn De La Motte v. Charles E. Fenton, Warden, Civil No. B-76-326, United States District Court, District of Connecticut. In denying that petition, the District Court (Zampano, J.) relied, in part, on the fact that this appeal had not yet been decided:

> "The hearsay issue is on appeal as part of petitioner's motion for a new trial. Since the disposition of the motion on appeal may render the present petition unnecessary, the pending action is premature." Memorandum of Decision, January 7, 1977 p. 3.

The District Court also relied on the prohibition of §2255 against a second presentation of the same issue.

in the very initiation of the p.. ceedings leading to his conviction that defendant De La Motte seeks reargument of his appeal on the point relating to the legality of his indictment by the grand jury.

Dated at Bridgeport, Connecticut this 9th day of February, 1977.

Respectfully submitted,

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C E R T I F I C A T I O N

This is to certify that a copy of the foregoing was mailed via First Class Mail to:

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Dated at Bridgeport, Connecticut this 9th day of February, 1977.

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